

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX SS.

SUPERIOR COURT
CIVIL ACTION
NO. 95-7378

COMMONWEALTH OF MASSACHUSETTS, *

Plaintiff *

*

vs.

*

*

PHILIP MORRIS INCORPORATED, R.J. *

REYNOLDS TOBACCO COMPANY, BROWN & *

WILLIAMSON TOBACCO CORPORATION, *

B.A.T. INDUSTRIES P.L.C., LORILLARD *

TOBACCO COMPANY, NEW ENGLAND *

WHOLESALE TOBACCO CO., INC., *

ALBERT H. NOTINI & SONS, INC., THE *

COUNCIL FOR TOBACCO RESEARCH-U.S.A., *

INC., and THE TOBACCO INSTITUTE, INC. *

Defendants *

BEFORE: SOSMAN, J.

Friday
July 24, 1998
Cambridge, Massachusetts

Patricia Bellusci
Official Court Reporter

APPEARANCES:

GEORGE K. WEBER, Assistant Attorney General, for the
Commonwealth

JAMES E. McGUIRE and JEFFREY WOOLF, Special Assistant
Attorneys General for the Commonwealth

THOMAS GRIFFIN, MARSHALL SIMONDS and CERISE LIM-EPSTEIN,
ESQS., for Philip Morris

WILLIAM T. PLESEC, DONALD WOOD and DENNIS MURPHY, ESQS.
for R.J. Reynolds

HARRY ZIRLIN, ESQ., for Council for Tobacco Research

Friday

July 24, 1998

Cambridge, Massachusetts

(10:10 a.m.)

THE CLERK: Your Honor, this is Superior Court case number 95-7378, Commonwealth of Massachusetts versus Philip Morris, Incorporated, et. als. It's here for a status conference.

Will counsel introduce yourselves, please.

MR. GRIFFIN: Good morning, your Honor. Thomas Griffin, counsel for Philip Morris and liaison counsel for the defendants.

MS. LIM-EPSTEIN: Good morning, your Honor. Cerise Lim-Epstein, counsel for Philip Morris.

MR. SIMONDS: Good morning, your Honor. Marshall Simonds, counsel for Philip Morris.

MR. MCGUIRE: Good morning, your Honor. Jim McGuire, Special Assistant for the Commonwealth of Massachusetts.

MR. WOOLF: Good morning, your Honor. Jeffrey Woolf, Special Assistant Attorney General for the Commonwealth.

MR. WEBER: George Weber, Assistant Attorney General. Good morning.

THE COURT: Before we get into the interview memorandum, privilege arguments, which I think are the main topic on for today, I was just handed a status report on the master trial exhibit list. It looks like you're making good progress. I appreciate the effort that you're making to organize this.

I don't know if there's anything in particular you wanted to go over with me about it other than to update me on how you're doing?

MR. MCGUIRE: Your Honor, Jim McGuire. Nothing in particular. The status report gives the current summary that the parties will meet and confer next week to continue the discussion.

We did have one joint question we would put to the Court. We know that we are going to be delivering hard copy of the trial exhibit list to the Court in form or forms as you dictate from time to time. The question that we have for the Court is, do you have any interest in having delivered to you an electronic database that would permit the Court to search and sort trial exhibits on the basis of rulings, issues, parties, or any other basis?

THE COURT: That's a good question. It certainly could be useful, and obviously you're

having to prepare it in that form, it might make sense for me to have it.

MR. McGUIRE: And the follow-up question would then be, administratively, is there somebody that we, the parties, could, on a joint basis, talk to in terms of what hardware, software, the Court has to ensure that we can deliver something to you that's as user friendly as we can make it and compatible with your system?

THE COURT: Let me give that some thought as to who would be the best person.

Any other concerns of the parties? I just have two small items that I've noticed going through it for myself to report back?

MR. McGUIRE: That's it.

THE COURT: On the question of suggested fields, I note that the only -- the only specific categories that deal with privilege claims where sort of the tracking of my rulings, or the grounds of my rulings are going to be reflected, is crime-fraud. And in my own mind I questioned, would there not be a reason for tracking -- since this is a very comprehensive chart -- some of the alternative grounds on which I might be ruling on privilege claims, i.e., that in my view the document was not predominately legal advice, or waiver, or in other words, some of the items -- you know, obviously there's a particular importance in tracking crime-fraud with some specificity because of the stages it has to go through and to make sure that all the stages are completed. But I was wondering whether we should not also be tracking rulings that have been made on other grounds?

Some already have been made and others may be made, or in some instances, there may be multiple bases for my rulings and those should also be reflected for everyone's purposes for appeals and the like. That would be my initial reaction to this, is simply, why don't we track the other theories that are being advanced by the Commonwealth as to why something isn't privileged?

MR. McGUIRE: The parties agree. We did not want to overwhelm the Court with a much longer list of fields, but if you look at the exhibit, under number 6, it says "privilege claim, type," and if you look on number 8, it says, "ruling on privilege claim."

We have in mind, at least, that we would pop in additional fields and then you would be able to see on any document if a privilege was asserted, whether it was asserted, what the basis

of it was, and what the particular ruling would be.

THE COURT: Correct. But if someone asserts, for example, attorney-client privilege, that can be overcome by waiver, by my sense that it's not legal advice, or by going through the different stages of crime-fraud.

I had thought 8 was simply representing the bottom line, yes or no, for whatever reason I've decided it is privileged or it isn't still privileged, but not tracking the alternative grounds.

Yes?

MS. EPSTEIN: Your Honor, I think that we have a subcommittee that is going to actually do the design of the fields, and I think that the Court's point is well-taken, and I have no doubt that we can accommodate that, right, Jim?

MR. McGUIRE: That's correct.

THE COURT: I mean, I'm just adding that as my one, off-the-cuff reaction that I have, having seen it. But I appreciate the update, and obviously, keep me updated on its design, and of course, its timing and numbers, as those are very important for my planning purposes.

Anything else we need to deal with today before getting to the merits of the privilege claims here?

MR. GRIFFIN: Agenda item number 2, we could either save it or deal with it now, your Honor.

THE COURT: We may have some miscommunication here. I don't seem to have literally an agenda for today.

MR. GRIFFIN: It was delivered yesterday. May I present a copy of the agenda? [Document handed to Court.]

THE COURT: Yes, number 2. Let's deal with number 2 now because I expect that will be short.

I, quite frankly, was surprised to get further briefing on the CTR issue. I mean, I don't mind getting things. Yes?

MR. ZIRLIN: Good morning, your Honor. My name is Harry Zirlin. I'm an associate at Debevoise & Plimpton. We represent CTR.

We received their supplemental brief, and we just want to know in the proceedings where we are now, you know, whether you need further briefing from CTR? If not, that's fine. But --

THE COURT: I don't think I do. As I think I indicated the last time, based on what I have heard, I am not going to be making some

sweeping, across-the-board ruling that everything that has anything to do with CTR is crime-fraud, or even that all of CTR itself is a crime or a fraud and that I should be thinking about it in those terms.

I still think everything having to do with CTR needs a document-by-document analysis: was the communication in furtherance of some use of CTR that would be criminal or fraudulent. And I have the parties very divergent positions about what they say CTR was and was not, or what it was and wasn't doing, as the background for that analysis.

As I say, I don't think I require further briefing on it, and I was surprised to receive the further materials I did from the Commonwealth. I was not expecting them. So --

MR. ZIRLIN: I guess the concern that we have though, is that, frankly, that you would give -- I'm not saying that we need a formal ruling that their last submission be stricken, but I mean, there are some things in there that are sort of new, you know, that we could address if we felt that there was some danger that you're going to be looking at that supplemental brief and ascribing any weight to it whatsoever. I mean, that's sort of where we are.

Well, as I say, because it was not expected and not something I was about to rule on in any way, I quite frankly skimmed it in only a very superficial way, and I had not focused on what specific items in there were perhaps new to me. As I say, I haven't done so yet.

If there are -- perhaps we should leave it this way, if there are items in there that you think are genuinely new, you know, not proffered by the Commonwealth in either of its prior written submissions, or the time we spent on it on the day we devoted to the subject, and you want to point those out to me as these are additional items and here's your response, you certainly may do so if you wish to guard against that concern. But I'm -- as I say, other than that, I'm just proceeding with what I've been given as the parties' general, you know, background on how they view the CTR issue, and that's in mind for future reference whenever I'm called upon to look at a crime-fraud issue about a specific document.

MR. ZIRLIN: Where we were prior is that we were supposed to have -- is that we thought we were going to have a response due August 3rd to that supplemental. Can I go back to the partners that I work for and tell them what you said, and

then if we do feel that we need to supplement, and hopefully it would be brief, have until like August 18th to --

THE COURT: Oh, easily. Again, because at this juncture, I do not anticipate doing that individual document-by-document review. So we have, you know -- until we're working from the exhibit list. So that pushes the time frame for that response back, you know, considerably. There's no need to give that particular brief any --

MR. ZIRLIN: Priority.

THE COURT: -- any priority earlier than then.

MR. ZIRLIN: Okay. Thank you, your Honor.

THE COURT: All right.

MR. GRIFFIN: Your Honor, I have one more item in the category of miscellaneous, if that's approximately where we are, that I'd just raise now. It's my issue and I hadn't thought about it, it really relates to a point of clarification about scheduling for upcoming events that relates to what the defendants are doing and when they're going to do it.

My question is occasioned by my review yesterday of the recent Supreme Judicial Court decision in *Vassallo v. Baxter*, which is an important product liability decision, and triggered in my mind a question for your Honor. That decision emphasized the importance of evidentiary hearings in *Daubert* or *Lanigan*-type proceedings where there are challenges to the reliability and integrity of scientific evidence proffered by experts.

In that regard, it had always been my view that there would likely be a *Daubert*-type attack on the damages model aggregating damages and perhaps with causation elements, conceptually. My preliminary view of the new model doesn't shake my confidence in the fact that there would be a like attack that we ought to plan for, *Daubert*-like, vis a vis the new model or the current model as most recently identified by the Commonwealth. And the question I had, in light of our discussion last week, having been triggered by reading that decision, was, the approach I had always had in mind is that *Daubert*-type attack would be in the nature of a Motion to Exclude or a Motion In Limine. And I had targeted that for when the CMO so provides for dealing with motions in limine.

It had not been my view that that particular issue, vis a vis the model, was a summary judgment issue. It is not a challenge on the law. It is a challenge on the facts about the

integrity of the expert evidence proffered. And I just wanted to make sure your Honor understood that because when we talked last week about making sure that summary judgment on September 15th included challenges on the law relating to the model, to the extent that they were identified and could be dealt with, we will deal with those set of issues, whatever they are.

But the issue about the Daubert, it seems to me, at least planning-wise, at least in our mind, in the defendant's mind, is an issue for the motion in limine stage, and I just wanted to make sure that that was correct and your Honor agreed with that concept and approach?

THE COURT: I see no flaw in that analysis in terms of how it should be handled and what category it comes in. That sounds fine. As I say, obviously I am concerned, particularly if we are going to be needing evidentiary hearings on it, that there's enough advance warning in terms of scheduling and time and logistics for that. But that -- but conceptually --

MR. GRIFFIN: December, that's easier than if it was September.

THE COURT: That's fine. I have no problem with that.

MR. GRIFFIN: Okay. Thank you.

THE COURT: All right.

MR. GRIFFIN: I think we're at agenda item number one, your Honor, if your Honor wants to proceed.

MR. PLESEC: Good morning, your Honor. William T. Plesec, counsel for R.J. Reynolds Tobacco Company in this matter.

MR. WOOLF: Your Honor, Jeffrey Woolf, representing the Commonwealth on this issue.

THE COURT: All right. I've read the various materials submitted by the parties, and it seems to me the first item to address is the theories of attorney-client privilege, as I certainly agree with RJR, if it is attorney-client privilege, we don't get to substantial need and those other issues. So I want to, obviously, go through that analysis first.

And before even leaping into the details of that, my preliminary question is, it was in RJR's memo for the first time that I saw a suggestion that I should be applying the law of something other than Massachusetts to these privilege arguments. That's the first I've heard that suggested, I think, in this case. And I was somewhat mystified by it.

Are we applying the law of something other than Massachusetts to this issue, Mr. Plesec?

MR. PLESEC: Your Honor --

THE COURT: Or was that footnote thrown in for make-weight?

MR. PLESEC: No, actually that point was made in earlier briefing.

THE COURT: All right. I missed it. I'm sorry.

MR. PLESEC: Massachusetts does apply the choice of laws concept, and analyzes it on interest involved. And typically in a situation as we have before the Court today, where you're dealing with a foreign corporation that has its principal place of business in North Carolina, where the employees who were engaged in the interviews were resident in North Carolina for the most part, then the choice of law concepts would defer to the law of the State of North Carolina as opposed to--

THE COURT: Let me ask you, where did the interviews physically take place?

MR. PLESEC: Primarily in North Carolina.

THE COURT: Primarily in North Carolina. And conducted by lawyers who were from your firm, which is predominately not in North Carolina?

MR. PLESEC: Lawyers from the Jones, Day firm, which is not domiciled in North Carolina; however the Womble, Carlyle firm is. And Womble, Carlyle lawyers did participate in those interviews.

THE COURT: All right. If that's what I should be doing, as I say, the brief that I got from you made various assertions, again simply in its footnote, about what North Carolina law was on the subject, and I suspect it's some typographical error or something, then had no citation for all of this, nor did I see any North Carolina case other than the Mason Day Excavating, which does not cover the specific points at issue in this motion.

So if I'm supposed to be applying North Carolina law, at the moment I am in utter ignorance of what North Carolina law is on the subject.

Let me hear the Commonwealth's position on choice of law?

MR. WOOLF: The Commonwealth's position, your Honor, is that this case is pending in Massachusetts; that the -- we're talking about an evidentiary issue, and so, the evidentiary law in Massachusetts is what should govern.

Further weight to that is when one looks at Mason, it says -- as a federal court, it looked to the state. In this instance the state

has not really settled this issue itself, just as Massachusetts has not, and so, in those instances it looks to the federal common law. So it is not as though we have in New -- excuse me, in North Carolina, a definitive position on this. It's also unsettled, and that's why the Mason Court says, well, they'll go back and look at federal law to the extent to which it is not inconsistent with state law. So they don't have a resolution on this either.

I think that plus the fact that we're dealing with evidentiary issues in Massachusetts would lead us to apply Massachusetts law, and of course, since we have no opportunity to file a reply brief, so I didn't brief that issue, if you're going to do that, I would ask for leave to explore the issue further.

THE COURT: Well, I'm looking at your footnote 7 in your brief. I take it, at least from your description, although without citation in this footnote, that North Carolina has rejected the control group test in some fashion or other is what you're saying?

MR. PLESEC: Basically, your Honor, North Carolina, in adopting uniform rules of evidence, rejected Rule 501, which deals with the control group test. And in rejecting Rule 501, what it essentially means, for purposes of analysis for North Carolina law, is that North Carolina has looked to -- is going to look to federal law for guidance. And we're dealing with the substantive law here on evidence.

We're dealing with a North Carolina corporation. We're dealing with North Carolina employees who are interviewed. We're dealing with counsel, in part who were from North Carolina, and so, under choice of law concepts, the correct analysis for whether or not interviews conducted by counsel for purposes of rendering legal advice to the corporation, even if those interviews are of employees, should be governed by the law of North Carolina which has rejected the control group test, and under normal concepts, we would interpret what North Carolina's intent is, is to follow Upjohn.

THE COURT: Let me further ask, I assume the answer to this is going to be no, because otherwise you would have put it very expressly in your brief, but I gather North Carolina has not said anything explicit on the subject of former employees, is that correct?

MR. PLESEC: We could not find anything explicit on that point, your Honor.

THE COURT: Okay. So just as

Massachusetts has nothing explicit on it, at least not from the S.J.C. or the Appeals Court, North Carolina has nothing explicit on it either?

MR. PLESEC: As far as we know, that's correct.

THE COURT: All right. Let's deal first with people who were at least then current employees at the time these interviews took place before we move on to the former employee part of the problem.

As I read RJR's argument, what they're saying is, at least, that whether it's North Carolina or whether it's Massachusetts, that with very few exceptions Upjohn is the trend and there's no reason for me to predict or assume that Massachusetts should not fall in line with that trend, and that at least as to the current employees, follow Upjohn.

Let me hear from the Commonwealth. What's the problem with that trend argument?

MR. WOOLF: Well, the trend argument, I think, your Honor, is undercut by the fact that effective January 1 of this year, the S.J.C. has adopted the -- if I get these right -- the new ABA model rules. We had previously been a code state, and now we are a rule state.

And under the provision of Rule 4.2, comment 4, we are essentially a control group state and we reject therefore the concept that attorney-client privilege applies to communications between a lawyer and anyone other than someone within the control group. And I think that absent a decision from the S.J.C., its adoption of the ABA rules and comment 4 to Rule 4.2, one would say that we do not accept the control group test.

And, of course, there are federal court decisions both ways. There's a magistrate decision saying that -- predicting that Massachusetts would adopt it. There's also a Superior Court decision which, for some reason, is directly contrary to the Massachusetts Bar Association Ethics Rule on whether or not, for example, employees who are witnesses to an accident -- going back to the Chadbourne case in 1962, and I know there are earlier cases besides that, but Chadbourne is very interesting for its ruling.

It takes various hypothetical situations and says, well, you've got these current employees; why would these communications be privileged? If you have employees riding in a company vehicle, and the driver's involved in an accident, if they were not company employees,

interviews of them would be work product and would be discoverable pursuant to Rule 26(b)(3).

The fact that they fortuitously happen to be employees of the corporation does not then clothe them with new status that they would not otherwise have. And Magistrate Judge Collings noted that. I realize that Leonen, Marshall is contrary to that, but the MBA, in a post-Upjohn ruling or ethical opinion 82.7, talks about just that example, and says in that context, there is no attorney-client privilege. You can talk to those people directly. And of course, a number of these cases derive rather from the narrow issue of attorney-client communications and interview memoranda, but can you go talk to current employees of the company. And the argument is, no. We are a control group state. We can -- you can go talk to these people. And if you can go talk to them because we are a control group state, then arguably, the same applies --

THE COURT: What's inherently inconsistent though with saying that someone was, you know, outside of the control group, but a witness, that the other side can go talk to them without violating some ethical rule, but if that employee-witness talks to his own company's own lawyer, that that specific communication will nevertheless be privileged? At the moment I don't see those as necessarily inconsistent.

MR. WOOLF: I think the reasoning behind the position that many states and courts have taken that those are not -- attorney-client communications fall into several arguments.

First of all, that employee has not gone to the lawyer for the purpose of obtaining legal advice. And this is where we get into the control group argument. They happen to be interviewed. They happen to possess factual knowledge, but they are not there to seek legal advice. And we have to go back to, among other cases, Fleet National Bank vs. Tonneson. Because the attorney-client privilege can and often does seriously impede the search for truth in a particular case, courts are reluctant to extend it and that is why they have said control group, this instance, that instance, where they will not impose an attorney-client privilege exemption to these materials, or conversely, limit the scope of the interview.

THE COURT: Let me stop you. The concern I have is, what RJR is arguing is that these arguments about why Upjohn shouldn't be followed have been presented around the country, and so far, most jurisdictions are rejecting these arguments and going with the analysis in Upjohn.

Does -- is there anything other than this new Rule 4.2 and its use of a control group

test for purposes of who can contact witnesses without violating some ethical rule, is there anything other than that to indicate that Massachusetts would not fall in with that trend, even if it's, you say, a bad trend?

MR. WOOLF: Well, I'm not sure it's necessarily the trend. I know that it's federal common law. It was limited by the Supreme Court to IRS subpoenas. Judge -- Chief Justice Burger, in his concurrence, limited it even further in certain circumstances. But I don't think it is as clear a trend as the defendants would paint.

I have to apologize, I notice that there was an error in our brief. We said Oregon. It's actually New Hampshire that has rejected it, and that is the case of *Klonoski v. Mahlab*, 953 F. Supp., 425, and I can give your Honor a copy. It's 953 F. Supp, 425, *Klonoski vs. Mahlab*, K-l-o-n-o-s-k-i, which says -- and it's just this kind of a situation where there was a medical malpractice case. Actually defense lawyers from Massachusetts went up to New Hampshire, interviewed the people at the hospital who were hospital employees, and the Court ordered the production of the interview notes with the employees of the hospital, saying, control group. That's the way we go. And this is a 1996 case.

So there are cases in Illinois, there's no question, and we quote it at length, and I think the defendants conceded, that Illinois is also one that has explicitly rejected *Upjohn*, and I believe that California has maintained its position as I cite it in the plaintiff's memorandum, that line of cases from *Chadbourne*.

So I don't think it's as clear a trend as the defendants would portray. It is clear that it's federal common law. Federal common law does not bind the states, and the S.J.C. has been quite explicit in saying that they are not bound by federal decisions. Even the U.S. Supreme Court, when it wasn't until *Kourouvacilis* that we rejected the *Catrete* testing, the summary judgment standard. It wasn't until *Commonwealth vs. Lanigan* that we decided to follow *Daubert* to a specific extent.

So I don't think the fact that the U.S. Supreme Court has spoken in *Upjohn* and the fact that certain federal circuits have followed it with federal common law in any way binds Massachusetts or any other state, and other states have been clear to say they are not bound by *Upjohn*.

So I think the preliminary question is, in terms of following a trend, I don't think it is a trend, and I don't think that there is any

indication we would follow it given our adoption of the model rules and the fact that former Chief Justice Liacos' book continues to cite the proposed federal rule of evidence, which refers to the control group test.

So I'm not sure that one could say that we're following a trend, if there is a trend, and that we should be following it. I think the extent to which *Marshall v. Levine* says otherwise, I think that someone overlooked MBA Ethical Opinion 82.7 because it specifically said in that instance it doesn't apply, and *Marshall* was directly contrary to that. But, what can I say? It's a Superior Court decision, and different Superior Court justices are of different minds on issues, particularly developing issues of law.

I think that there are other things to be said, and one of them, it's interesting because the *Mason* case on which the defendants rely, cites in turn in a number of places, *Leonen vs. Johns-Manville*, which is a case we cited. And the import of *Leonen* has to do with the fact that attorney-client privilege doesn't apply to work that could be done by a non-lawyer.

And then we get into the fact that the courts, in narrowly prescribing the limits of attorney-client privilege, chip away at things that would otherwise, but for these arguments, say it's not an attorney-client privilege.

One is, was it something that could have been done by a non-lawyer, which is the holding in *Leonen*, which we cite, and which *Mason* cites. And here, where we're talking about: Tell me how you set up your library, when Dr. Colby was interviewed. "I spent two years going to New York buying books and I set up a library." Now, is this something that requires a lawyer to deduce? This is obtaining historical information. This is something that if RJR had written its history wouldn't be in these interview memoranda, and I don't think in that context -- and we went to great lengths to summarize for the Court the nature of what was contained in these interview memoranda. They are in Tab 2 of our appendix to our brief. These are not attorney-client communications for the purpose of obtaining legal advice, and they are not things that needed to be done by a lawyer, and the courts have said, clearly, in those two context --

THE COURT: But I see no reason, I must say, to disbelieve the affidavits coming from Jones, Day, explaining that they were stepping in to help RJR with a massive amount of pending

litigation, and they were getting information for purposes of helping to prepare a defense.

MR. WOOLF: I agree, your Honor, but the difference is, in Upjohn there was a current crime that was going on. They were bribing foreign governments, and the IRS stuck its nose in, and they said, What's going on? Tell us what's going on?

As your Honor observed, this is in 1985 -- going back to 1985, saying, tell us what happened 15 or 20 years earlier. It's not for the purpose of gaining information for specific legal advice, and that is one of the prescriptions for an attorney-client communication. Not all communications between a lawyer and a client are privileged and --

THE COURT: Right. But the criminal defense lawyer who sits down with his client and says, Tell me what happened? And his client says, You know, I did rape her. That's historical information. It's in the sense it's past. He's in custody. It's not ongoing. But surely, surely, obviously, we treat that as attorney-client privilege.

MR. WOOLF: Right. But that's for that crime. Just as Upjohn was for that crime. It is not historical information: Tell us the history of the company.

THE COURT: This is for these ongoing lawsuits that allege misconduct and wrongdoing of various kinds out of these past historical events.

MR. WOOLF: But is anyone saying that there's wrongdoing in Dr. Colby spending two years to build a library? No, they're not. And I think the facts that are extracted from the interview memoranda as they are quoted at length in the Fact Team Memorandum, so-called, indicate that this is not something about, you know, did you do the crime? Did you bribe the foreign officials? Did you in fact rape the victim? That's not what this information is about, and therefore, one should distinguish between historical information as your Honor observed, asking somebody in 1985, what happened in 1971, is different, and that's the point we are trying to make.

So we would suggest that there's a distinction that applies to, you know, just sort of general background, you know, go read the history of the corporation, as opposed to, tell me the background events history because maybe it happened yesterday or it happened last year, but that's not what we're talking about. And so,

history, when it's, did you bribe the foreign official last week or last month, in Upjohn, is different from, in 1985, tell me what happened in the sixties or seventies.

THE COURT: I must say, I do not find that line of analysis persuasive, and what I wanted to do is take this piece by piece and focus on this trend argument, and Upjohn itself.

Let me hear RJR's argument on the subject of why should I conclude that Upjohn is Massachusetts law, if it's Massachusetts law and not North Carolina law?

MR. PLESEC: First of all, your Honor, I think that in terms of the trend, we believe the case law demonstrate that there is trend in favor of the Upjohn case. As you look at the jurisdictions around the country, and if you were to do an analysis, you would see that the vast majority of the Courts are rejecting the control group test in favor of the Upjohn formulation.

Massachusetts has not reached that point, but the case law in Massachusetts has cited favorably to Upjohn. That has been demonstrated in the cases cited in our briefs. The willingness of the courts of Massachusetts to follow federal law when --

THE COURT: I must say, I obviously took a look at those with interest. The S.J.C. opinion, I think, cites Upjohn for the proposition that the attorney-client privilege is important. I mean, that -- you know, it doesn't in any sense endorse a specific analysis in Upjohn. It just -- at that point it was obviously the most prominent, the most recent, and from the highest level court, endorsement of the general proposition that this is a very important privilege.

I find it hard to view that as any signal that the actionable issue raised by Upjohn is going to be followed in precisely the same way by the S.J.C.

MR. PLESEC: But the Court, your Honor -- I agree, it didn't specifically say we are adopting Upjohn and we are going to follow -- reject the control group test and so forth. But the indication is that it has quoted Upjohn favorably.

The implication from that is, that based on past history of the Commonwealth of Massachusetts, when analyzing issues of this nature, where the Courts of Massachusetts have not spoken to the issue, they have looked to, and shown a willingness to look to, the federal law. And I don't think it's a real stretch or a real reach to suggest that the courts of

Massachusetts, when analyzing a situation like this, would indeed follow the Upjohn test, or the Upjohn formulation.

Your Honor, I think as a practical matter, it makes sense to reject control group in favor of the Upjohn formulation.

As the court in Upjohn clearly stated that the attorney-client privilege is the oldest privilege, and its purpose is to encourage full and frank communications with a lawyer so that the client can get proper legal advice.

Now, the only way that a corporation can indeed get proper legal advice is for the client, through its employees who have the relevant information, have those employees convey that information to the lawyer. The lawyer then in turn can provide, based on that information, the legal advice that is required by the situation.

I think that if you were to limit the rendering of legal advice simply to discussions and -- excuse me, apply attorney-client privilege principles simply to discussions involving the control group in a corporation and their counsel, the control group would not necessarily have the pertinent information that is needed by the lawyer in order to provide the legal advice that is requested. A control group may not have the day-to-day activities, responsibilities, etcetera, that deal with the issues for which the corporation is seeking legal advice.

And so, in order for the client to get legal advice that is meaningful, it is going to have to have those with the pertinent relevant information convey that information to the counsel, who in turn can sift through the information, do as the court in Upjohn suggested, analyze the relevant from the irrelevant, decide which is important, and then provide the legal advice.

So I think that if the principles articulated in Upjohn and its progeny since are to be given any kind of respect, and we suggest that they should, if attorney-client principles are to really mean what the courts have said they mean, then the control group test should be rejected in favor of the Upjohn formulation.

And we do believe that the Commonwealth of Massachusetts will, in the final analysis, follow that formulation.

THE COURT: If I could also just ask you briefly. I haven't tied them up from the various cases you cite. Do we have a comprehensive list of actual state court decisions, i.e., literally state court decisions that have decided to accept

Upjohn as opposed to federal courts where you've got to sort through, was it a federal case, federal common law; are they simply predicting that, you know, Mississippi or wherever is going to adopt it. I mean, how many actual states, state courts have already decided to accept or reject Upjohn, and how many states is it still an open question?

MR. WOOLF: I don't have a definitive answer, your Honor, but I believe that only a handful of states have addressed Upjohn per se.

THE COURT: One way or the other?

MR. WOOLF: One way or the other.

Oregon has not actually addressed Upjohn per se, but they did broaden Rule 501, so that, you know, is sort of an answer that's equivalent to the Massachusetts one, which is, Upjohn has not been addressed but unlike Massachusetts, they have broadened the rule.

I know New Hampshire and Illinois have specifically stated their position. They go with control group. I believe there's another state that may have addressed that --

THE COURT: I mean, even the New Hampshire case you cite to me is itself a federal case.

MR. WOOLF: It is.

THE COURT: I'm answerable to the S.J.C. I want to know what the functional equivalent of the S.J.C. around the country are doing when asked as part of their state law as opposed to all these federal courts speculating about what the state's going to do.

MR. PLESEC: Your Honor, I don't have a definitive answer for your question either, but we would be prepared to submit additional briefing on that. I can tell you that we did a preliminary --

THE COURT: I don't think it's a brief. It's just a table or a listing --

MR. PLESEC: A tabulation --

THE COURT: -- of the citations themselves that are truly, as I say, state court decisions, not a federal court that's applying federal common law, or a federal court that is predicting that a particular state will follow Upjohn, because that I think goes in a very different category in terms of how -- how much of a trend there is among the states themselves. It would be useful to me.

MR. PLESEC: We will submit that, your Honor.

THE COURT: Just a list. And, you know, coming from either side, rather than trying to

glean that from your briefs where it didn't pop out of the page at me.

Any further arguments about why I should or shouldn't follow Upjohn beyond this argument about a trend that either side wishes to add, beyond what's in your briefs and what you've already told me, before we move on?

MR. PLESEC: Well, your Honor, if I might just respond to a couple of the points that Mr. Woolf made earlier. He basically said that the employees who were being interviewed by the Jones-Day and Womble-Carlyle lawyers were not seeking legal advice per se, personally. They were there at the direction of the client, the corporation, to provide the lawyers with relevant facts so that the client corporation could get legal advice.

If the employees are not going to convey that information to the lawyers, then the corporation can't get the legal advice it needs in order to defend itself in litigation or get the proper assistance from counsel with respect to other issues.

And so, the employees themselves don't personally have to be getting legal advice. They are simply providing information, and Upjohn makes clear that legal advice runs both ways. The legal advice provided by the lawyer as well as the information provided by the client. And in the corporate situation, the client can only provide legal advice through the voices of its employees, and that's what was done here in this case, and was done in the Upjohn case.

With respect to the argument that the interviews could have been conducted by non-lawyers, I don't know how a non-lawyer can gather information for the purpose of providing legal advice to a client. It's the lawyer who has to gather the information, sift through the relevant and irrelevant as the court in Upjohn said. As a matter of fact, Upjohn teaches us that the first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts. The court goes on to quote that the ABA Code of Professional Responsibility, that it is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. It's the lawyer that has to do that, not some non-lawyer.

I just don't believe that the argument that is set forth by the Commonwealth in that respect has any merit at all.

The Commonwealth argued that in Upjohn, the court was dealing with a current crime. In

our situation, they claim that we are looking back historically into the fifties for factual information. The fact of the matter is, that in the cases that are pending around this country, including this case here, allegations have been made going all the way back to the--

THE COURT: I understand your position on that, as I think I've already agreed. On that point, at least, I'm satisfied and I would agree with you.

Anything further on the control group?

MR. WOOLF: Yes, your Honor. The concern that the courts have expressed and your Honor included is that one can create what's called an overly broad zone of silence. By having the lawyers go out and do things, it automatically sweeps it under an attorney-client privilege, and as your Honor observed, why have insurance adjusters go out and do things that non-lawyers -- that lawyers can do. Instead, have the lawyers do it and it will become privileged, it will be attorney-client privilege, and that is one of the reasons that the courts have rejected the broad scope that Upjohn envisions because they're concerned, and of course the Appeals Court, that the U.S. Supreme Court reversed, went on at length about this whole concept of the zone of silence and the fact that there's this danger that because a corporation can only speak through employees, if you start casting your net too widely, you wind up privileging a lot of things that in the normal course of events but for a corporation would not be privileged. And that is one of the concerns that a number of the courts have had and express pre-Upjohn about why it is limited to a control group; why we don't do this. Because of the danger of just this kind of thing, of having people go out and gather historical facts, things that insurance adjusters and investigators -- private investigators do, day in and day out, and say, oh, the lawyer did it. It's privileged. And not just privileged because of the work product. Attorney-client privileged, and therefore, a much higher degree of protection.

And so, when we talk about, well, the lawyers did it, the lawyers had to think about what to ask the witnesses, insurance adjusters and private investigators do that all the time.

It's not something that of necessity requires, you know, great legal skill, admission to the bar, or whatever, particularly as these interview memoranda as quoted in the RJR Fact Team Memo, and to a lesser extent the Doomsday Memo or the Cap Memo, as it's called, show, this is not something that required a law degree. This

is not sifting through facts. This is Dr. Colby: Where did you go to buy your books? And how long did it take you to build a library? You know, who did the summaries of the articles? These are not things that require a lawyer's mental impressions, acumen, skill as trial counsel, to sort out.

This is exactly the kind of stuff that the courts were concerned about being protected unnecessarily and unduly by a zone of silence concept that the defendants are urging right now.

And with regard to the other aspects of this, because it's fact-gathering, and because it is really historical, it is not directed toward the litigation, it's different. Because how can someone say with a straight face to this Court, that asking Dr. Colby where he went to buy his books, and how long it took to establish a library, is germane to any of the claims about youth targeting, or nicotine manipulation, or any of the other kinds of things that are going on in this and any other State A.G. case, or even the individual smoker cases from years ago. They're not.

And to cast this net so broadly is exactly the danger that the courts had warned about and why states have rejected the Upjohn test.

MR. PLESEC: Your Honor, if I just might respond?

MR. WOOLF: Just one quick -- I assume this is all addressed solely to current employees?

THE COURT: Current employees, yes. We'll move on to former employees shortly.

Yes. Go ahead, Mr. Plesec.

MR. PLESEC: Your Honor, we are not suggesting that the factual information within the knowledge of the employees is itself privileged.

THE COURT: I understand.

MR. PLESEC: It's the communication of that information to the lawyers, the communication is privileged. And I believe that Upjohn has addressed that when it stated, and I quote, "Application of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications, that is, the communication between the client and the attorney. It does not protect disclosure of the underlying facts by those who communicated with

the attorney."

We're not suggesting that the facts are privileged. We're suggesting that the communication from the attorneys or with the attorneys by the employees and reflected in the interview memoranda are privileged.

Now, again, with respect to counsel's comments about Dr. Colby and the library, Upjohn certainly addressed that point too, which is a point I made earlier. It's the duty of the lawyers to go out and gather the facts, sift through the relevant and irrelevant. The fact of the matter is, many of the things that he's talking about found their way into the Corporate Activities Report, and the R&D Fact Memo, we thought were salient facts that we ought to write down.

THE COURT: Again, the Commonwealth's argument along these lines does strike me as novel. The attorney-client privilege, if it applies, it protects it whether it's incriminating, or innocuous, relevant, irrelevant. So is it, you know -- does it satisfy the various categories, and it's not on the list of what it takes to be attorney-client privileged that it be incriminating. It can be innocent and still be -- or favorable to the defendant and still privileged. So I don't think that's the issue.

This part of the argument, it seems to me, it simply comes down to, do I follow Upjohn or not. That I think is what this piece of it hinges on.

So I'll await your updates on state decisions and take that issue under advisement.

Let's move on to the former employee problem. Now, I think you put the numbers here. Remind me, how many of the witnesses that we're dealing with here are -- come into the category of people who were former employees at the time of these interviews? What are we talking about?

MR. PLESEC: Your Honor, I apologize. I thought we were going to have a list with us today, but unfortunately, we didn't bring that with us. I don't have the exact number.

I believe that at the time the interviews were conducted in 1985, most of the people, the major fraction of the people were indeed currently employed.

THE COURT: Okay. Setting aside for the moment who these people were that were former employees in such details as, you know, how long ago they'd left or any of those semantic things, let's deal, first, fundamentally with the

problem.

I must say, I must say that I do find the concurring opinion that sweeps former employees into this concept baffling. I find it hard to understand how someone who is no longer an employee is a client of the corporation's lawyer. That sort of, with all due respect to Justice Burger, defies my imagination.

They may be a witness. They may have need for their own legal counsel quite badly, particularly if that employee is one of the people who is alleged to have done something wrong. It seems to be one of the things underlying Magistrate Judge Alexander's decision, quite frankly, is this interview of the employee who was alleged to have done the actual wrongful act, who had left her employment a few days after the alleged wrongful act.

But I find it hard to understand how corporate counsel is in any sense the lawyer for someone who's no longer with that corporation. I am very troubled by the idea that former employees are clients, or should be viewed as clients of the corporation's lawyer. And I don't get the impression from reading either side's briefs that that aspect of the concurrence in *Upjohn* has reached some kind of widespread acceptance, or certainly not widespread acceptance by states.

Let me hear from RJR on that.

MR. PLESEC: Well, your Honor, again, the principle here is a corporation going to an attorney trying to get legal advice with respect to a legal issue. If the corporation, which is the client, is going to get proper legal advice, it has to have the persons who were employed at the -- by the corporation at the time of the events in question provide that information to the attorney.

If one of those persons happens to be now a former employee, that should make no difference. If at the time --

THE COURT: Suppose one of those persons with the most critical information has never been an employee? The attorney's need for the information is overwhelming, but we never say that somebody becomes a client of that lawyer simply because the lawyer needs that person's information. We wouldn't apply this theory of, well, if the attorney needs it, we'd better call it attorney-client privilege so that the attorney can get it. We call it work product if we need to, and we often do. But it's the attorney-client label being put on this simply because, well,

attorneys need this information so we'd better call this attorney-client to make sure that the attorney's able to get it, strikes me as very flawed logic.

MR. PLESEC: Your Honor, if I understand the hypothetical posited by the Court, the person who was never employed by the corporation, even though that person may have important information, would never be viewed as a person who is a client of the corporation, or excuse me, an employee of the corporation and therefore the client conveying information to the lawyer. I agree with you that that scenario, under that scenario, the person would be a third-party witness who had pertinent information. The lawyer interviews that person, and the memoranda created by the lawyer would be opinion work product.

But that's not what we're dealing with. We're dealing with a person who was employed by a corporation, who was involved in the activities or events that are now the subject of legal proceedings, but since that time has left the corporation. That person is the, for all intents and purposes, the client who is going to be conveying the information to the --

THE COURT: The former employee may have interests that are now incredibly adverse to the former employer who would never view the corporation's lawyer as even friendly perhaps, let alone as his lawyer that he should be confiding in, that we need to protect the confidentiality of it. That person can refuse to talk to the lawyer, short of subpoena. That person can go get his own lawyer and, you know, why should we view him as a client, or within the definition, or the people who will be deemed to make up the corporate client simply because the attorney has use for his information?

Once he's left - once he's left, his employer can't force him to talk to the attorney as opposed to, you know, current employees can be told, we want you to go tell our lawyer everything you know about X, Y, and Z. A former employee, they can call him up. They can ask him to cooperate. He can cooperate. Cooperate in part. Tell them to get lost. Do whatever he wants. I have a hard time saying that he's a client just because he happened to be there at some important point in time, but isn't there at the time of the interview, and therefore, no longer - no longer within the corporate family.

I would be, quite frankly, troubled, at the idea that that employee would now be told, well, because what you told us was attorney-client privilege, even though you didn't view

yourself as your (sic) client, you may not tell anybody else what we discussed. I mean, that's one of the ramifications of calling this attorney-client privilege is that former employees can be, you know, can be told that they themselves may not divulge things to others because of this attorney-client privilege communication.

I'm very troubled by this, obviously.
Let me just hear you out. But I --

MR. PLESEC: Your Honor, under the hypothetical that you posited, again, let's assume that the person who was involved in these activities is employed on day one, and on day one, is interviewed by the lawyer at the direction of the corporation to provide relevant information.

The lawyer takes that information and provides legal advice. That's a current employee. Let's say that the same scenario, but on day two, that person has left the company and is now interviewed by the lawyer. There should be no difference in the way the information is treated. If the ex-employee is willing to provide information to the lawyer for purposes of that lawyer providing legal advice to the corporate client about activities within the scope of that person's employment while with the corporation, then that information ought to enjoy the privilege status that the information would enjoy had that been provided the day earlier while that person was still an employee.

Formalistic line drawing on when the attorney-client privilege will begin or end, I think --

THE COURT: I can't resist. I can't help myself. Let me ask you this. Here's one of the many problems I have.

If you say that's attorney-client privilege, that means that the lawyer for that corporation -- say this person's a very important witness, very important witness. The corporate lawyer for that corporation that he used to work for can go talk to him, interview him. That lawyer can tell him all kinds of things about the lawyer's own views of the case, strategy, etcetera, etcetera. All right? And you would say, it's attorney-client privilege. And yet the client is still the corporation. So unless the corporation says this former employee can disclose that to someone else, then theoretically, at least, the former employee is now not supposed to disclose that even if he wants to, to anybody else. You would so argue, I

assume.

Now, he's an equally important witness to the other side. The other side's lawyer goes to talk to him and interviews him. The witness himself is now free, at least, and nobody could stop him from divulging what the other side's lawyer told him. He could tell it back to the corporation. He could tell it to the Boston Globe.

By applying this, I must say, you are taking a very important witness and effectively saying what that witness can then himself go around and share with people, even if that witness didn't view this company's lawyer as his lawyer at all. He can disclose to one side's but you'd bottle him up as to the other side's.

Why shouldn't he just be treated as a third-party witness, because he's no longer there, work product comes in to protect both sides equally, as need be, and as appropriate, and yet, the witness himself - the witness himself is free to disclose to others what he wishes or doesn't wish to, about what he has said to the lawyers, what the lawyers have told him. Everybody's on the same footing with regard to former employees.

MR. PLESEC: Your Honor, I think that we have to draw a distinction between what the former employee is going to be allowed to disclose.

Again, the former employee, just like the current employee, can disclose the facts to the opposing counsel, that's not privileged. The facts are not privileged. But the communication with the corporation's lawyer is privileged if the information is provided to that lawyer for purposes of providing legal advice to the company.

THE COURT: But obviously this communication with the other side's lawyer is not?

MR. PLESEC: That's correct.

THE COURT: All right. But you're trying to bottle up - you're trying to bottle up what he told the company's lawyer simply because of his status as a prior employee. And the question of bottling that up, or not bottling that up, isn't in his control. It isn't in the witness's decision: I want to disclose this or I want to treat it as confidential. It's his former employer's - it's his former employer's right to waive or not waive that privilege. And the witness himself, you would say, can't even do it.

Does the witness appreciate all the

ramifications of what he's getting into when he talks to the former employer's lawyer? Does the witness himself view this as confidential? Not necessarily.

MR. PLESEC: Well, I think in the normal circumstances, the witness would --

THE COURT: A current employee I would tend to agree with you. It's perhaps one of the reasons why Upjohn does make sense. Current employees could well view, you know, what I'm about to tell the company's lawyer is confidential and that's part of encouraging them to provide the information and be truthful and all of that. But when former employees view what they told their former employer's lawyer as confidential?

MR. PLESEC: Your Honor, I think that while the case law at the state court level has not fully developed on this point, there are a number of cases that have articulated the principle that was announced by Chief Justice Burger in his concurring opinion in Upjohn, where Chief Justice Burger said that the general rule is that a communication is privileged, at least, when as here, an employee or former employee speaks at the direction of management.

THE COURT: I realize Justice Burger said that. I am trying to understand why. The majority, obviously, very carefully skirted the issue, and very deliberately did not reach it.

They viewed it as posing a complicated and more difficult question, which I think it certainly does. It has ramifications that I find troublesome. I think it gets -- I must say, it gets into very -- I mean, one of the cases cited here, I think it was Judge Sarris's decision, do pose that peculiar problem of the other side's lawyer goes to talk to one of these former employees, which they clearly are allowed ethically to do, and then find themselves in trouble because that employee, that former employee is not appreciating that this was attorney-client privilege, went and perhaps said something that was attorney-client privileged, and the other side's lawyer finds themselves dragged onto the carpet for having, you know, supposedly interfered with the attorney-client privilege.

If the witness doesn't view it as privileged, the witness might or might not, depending upon the circumstances, why should I be imposing -- in essence, imposing privileges that the witness-employee, slash, client, you know, client in quotes, doesn't even -- doesn't view as

confidential; doesn't view himself as a client?

MR. PLESEC: Your Honor, the distinction between an ordinary third-party witness and a former employee, I think is demonstrated by the fact that a former employee's conduct with the corporation may be imputed to the corporation, and indeed, may be the very conduct that is the subject of legal proceedings as opposed to a third-party witness who is just making observations about particular facts that he or she happened to observe.

And so, if the corporation is to get proper legal advice, then the communications of the former employee about the activities that are the subject of legal proceedings, the communication of that information to the lawyer representing the corporation has to enjoy the attorney-client privilege protections that are suggested by Chief Justice Burger in the Upjohn decision.

THE COURT: That seems to be simply going back to the argument though that if it's important - if it's important, we have to clothe -- if the information that he has to divulge is important, we have to clothe it with attorney-client privilege to protect it. And, as I say, we don't run around calling things attorney-client privilege simply because the substantive information that the person has to relay is important or even vital. Sometimes the most crucial information comes from third parties, and we protect that as work product.

MR. PLESEC: But, again, your Honor, the information is available to the adversary. The adversary is permitted to either interview or depose or whatever to gather the information that the adversary deems is appropriate. And that ex-employee, just like a third-party witness, is free to disclose what he or she knows about the facts relevant to the proceedings.

The difference is that the communication that that person has with counsel for the corporation is a communication that should enjoy the attorney-client privilege just as a communication from an employee should.

THE COURT: What do you make of the situation where the former employee is actually hostile, antagonistic, has adverse interests to his former employer, and is willing, you know, in a begrudging way, to talk a little bit with the company's lawyer, but not real excited about it.

Suppose the employee's even gone and gotten his own lawyer? Again, perhaps we're dealing with a former employee who himself has some personal exposure arising out of the incident, and he's gone and gotten his own lawyer

in whom he's confiding, but we'll nevertheless say, Justice Burger says he's a former employee and this is privileged, even though he's in fact in some sense an adversary, in some sense has divergent interests. We're going to call this privileged?

MR. PLESEC: Well, your Honor, I think in that scenario that you just described there may not well be an attorney-client privilege communication because the ex-employee is hostile, has indicated that he or she does not want to regard the communication as confidential, and has indeed expressly said that he or she will not regard it as such. I find under that fact pattern that it would be very difficult to assert attorney-client privilege for the communications between the attorney and that ex-employee. But that's not the scenario --

THE COURT: How do we make that assessment? How can we make that assessment short of a lot of very complicated pulling apart of exactly, well, you know, what did he say to whom, including such things as, you know, in camera reviews of what he told his former employer's lawyer. It seems to me that it gets awfully convoluted to figure out how -- where you're going to draw that line and how you're going to enforce it and figure it out on something that, if it's attorney-client, it has this, you know, inviolate absolute protection.

It strikes me as fraught with problems. Again, to the extent, since you're putting together this table of state decisions on Upjohn, I would again appreciate anything on that that shows states picking up on and adopting Judge Burger's concurrence on this subject.

I can appreciate, and again I think it was perhaps in Magistrate Judge Alexander's mind in dealing with the -- I forget the name of the case, but when I read it, it involved a defamatory letter drafted, or allegedly defamatory letter drafted by that employee two days before she left. The suit's filed immediately. She's asked about it by her former employer at a time when clearly that former employee has her own exposure, has her own potential liability for it. The statute of limitations had obviously not run. There might have been a lot of good policy reasons under those circumstances to read into that that she would have thought that the company's lawyer was very much on her side; was the functional equivalent of her lawyer, and some understandable reluctance to let the other side get their hands

on what she had told the lawyer on those peculiar circumstances with that very tight time frame where she herself had exposure.

In that sense I'm not sure that I disagree with the bottom line of what Magistrate Judge Alexander did, but I'm not sure that the Judge Burger analysis is the right one as to why you should reach that bottom line in that kind of, you know, unusual case.

Is there anything the Commonwealth wants to add?

MR. WOOLF: Your Honor, I agree that this is the slippery slopes to start saying -- you know, extending to ex-employees, you know, on the basis of the critical nature of the information, one can then go to independent contractors, non-party witnesses, and one descends down the slippery slopes from there.

I was going to ask, however, if Mr. Plesec would be kind enough to furnish the Court and the Commonwealth with a definitive list of current and former employees. We only were able to provide your Honor with what we knew at the time, and as your Honor saw from the exhibit, there were a number where we did not know the person's status. So for the Court's edification and the Commonwealth's, if they could provide the list that they intended but failed to bring today, giving us a scorecard on all of the witnesses.

THE COURT: Just what their status was as of the date of interview.

MR. PLESEC: Yes, we can do that.

THE COURT: Just so we know what this category, who they are and how big it is, and whatnot. I'll think about it, and await your lists, but it seems to me, assuming that I do follow Upjohn as to the current employees, I'm leaning heavily towards not adopting Judge Burger's approach with regard to the former employees, and those at least we'd then need to talk about on work product and other analyses for which we might -- we'll need some other information anyhow.

Let's move on to the alternative work product analysis which may be needed as a fall-back for some, perhaps all of these, depending upon how I rule on Upjohn.

Let me hear first from RJR on the work product analysis. I think I would have no dispute with the fundamental proposition that these interviews are, at least in the first instance, some form of - some form of work product, but do you have any recommendation as to how I, sort out whether they are, you know, core

opinion work product as opposed to plain work product, short of in-camera review of the actual, be they notes, memoranda, transcript, I'm not sure what form the different items take?

It does seem to me that there's some -- you know, if what you have at one end of the spectrum is basically the transcript, I'd have a hard time viewing that as opinion work product. If at the other end what you have is the attorney's own thoughts about what this witness said, what this witness adds to the case, how this witness might be helpful, harmful, how credible the witness is, how reliable he appears, it can contain things that would obviously, in my view, be absolutely core opinion work product, and that we have a spectrum in there and I would have to decide, if I reach work product analysis, where along that spectrum a particular interview fell.

I'll hear you on that, Mr. Plesec.

MR. PLESEC: Your Honor, I think as I've mentioned in prior discussions of this topic, last month and again as articulated in our briefs, Reynolds' position on this topic is that the entire memorandum is opinion work product.

What the memoranda reflect, as the affidavits submitted to the Court verify, are the mental impressions and judgments, opinions and analysis of the lawyers on a variety of topics.

The memoranda reflect interviews conducted by the lawyers. The lawyers prepared for those interview memoranda by selecting documents and deciding which questions to put to which interviewee.

The lawyers decided which of the responses should be recorded in the interview memoranda. All of that, the process itself, reflects the mental impressions, the opinions and judgments of the counsel who were conducting the interviews. And so, the actual drafting and writing of the memo is a reflection of opinion -- excuse me, core opinion work product. And so, there is no way to really redact out any of the facts --

THE COURT: How can I tell that without seeing them? You know, if an attorney goes out to a witness and says, Tell me what you know about the accident of August 5th? That's the only question the attorney asks, Tell me what you know? And then the attorney just takes down what the witness says. I would have a hard time viewing that as opinion work product. That's the attorney as scribe, as I mentioned earlier, that's one end of the extreme. Or perhaps even

the more extreme would be the tape recorder that's going and that's literally just the tape recording of the transcript of the witness's own version.

Then you have gradations along, you know, all the way down to something that is indeed absolutely just the attorney writing up a memo, you know, I interviewed so-and-so. He clearly knows a lot about this. I think he's very reliable. He'll help us corroborate so-and-so. Need to follow-up on his suggestion that I look at such-and-such. I mean, it could be just full of nothing but attorney impressions, analysis, reactions to the witness. Or it may contain some of both where it could be redacted, or be so intertwined that it couldn't. I mean, how do I assess that without seeing them?

MR. PLESEC: Your Honor, I think that it's pretty clear from, at least in my judgment, from reading *Hickman vs. Taylor*, and the *Upjohn* decision, that the courts -- the Supreme Court of the United States has already decided that when a lawyer interviews even a witness -- let's take it outside the context of employees of a client -- even a witness, then the oral statements made by that witness to the lawyer and recorded by the lawyer are not regarded as ordinary fact work product.

If the lawyer, in your hypothetical, decided that the only question that he or she wanted to put to the witness was, what do you know about this, that's a reflection of the mental processes of that lawyer as to what is the key issue for this particular witness.

And the recording of the response in the way that the lawyer records it, is the mental impression of the lawyer as to what is important in the information being provided by that witness. The entire document, therefore, under *Hickman* and under *Upjohn*, would be protected as opinion work product.

THE COURT: If a lawyer goes out and says, tell me what you know about this accident, and flips the tape recorder on, are you telling me that tape is opinion work product?

MR. PLESEC: Your Honor, if the entire interview boiled down to one question and one answer, I believe that's correct.

THE COURT: That's opinion -- the tape is opinion work product?

MR. PLESEC: Well, the tape reflects the mental processes of the lawyer as to what question to put to this particular witness. The other side is free to go interview that witness.

The other side can ask whatever questions they want of that witness, and whatever information they get is likewise opinion work product if they record it in some fashion.

But the mental impressions, the judgments of a particular lawyer as to what question to put to a witness --

THE COURT: Suppose we excise from the tape the question, what do you know about the accident of August 12th, we redact that, and we just get Mrs. So-and-so who starts off, I was standing at the corner of Elm Street and Main Street. The light turned red. I saw the truck. He was going about thirty miles -- this is her voice - her voice, giving her narrative of what she saw, that's opinion work product?

MR. PLESEC: Your Honor, if that was the record of the interview memoranda, I believe it would be under the case law.

THE COURT: What kind of work product is there that isn't opinion work product in your view? Can you give me an example of something that isn't, that's work product but not opinion work product?

MR. PLESEC: Again, your Honor, as I suggested to the Court last time, I think an example of fact work product would be to go to take a statement from a witness, where the witness provides information and then signs a statement. That's the witness's statement.

The witness is now unavailable, either because he or she is dead or for some other reason, and the other side does not have an opportunity to gather that person's information, under that scenario, I do think the opposition or the adverse party may be able to convince a court that they should have access to that statement.

But if the person was interviewed by a lawyer, and then becomes unavailable, and the interview memorandum is opinion work product, I think that the opposition has to demonstrate more than substantial hardship, substantial need or undue hardship in order to get any information from the other side.

Indeed, as Rule 26 here in the Commonwealth of Massachusetts states, that in ordering discovery of factual material, when the opposition demonstrates substantial need and undue hardship, the court shall protect against disclosure of mental impressions, conclusions, and opinions, and legal theories.

And under that scenario, what it means is that opinion work product shall be protected and should not be disclosed to the opposition.

In the example of a factual statement signed by a witness, that is the witness's statement. It's not the lawyer's statement. That's not the opinion of the lawyer or the mental processes of the lawyer. It's the statement of the witness.

THE COURT: In the tape recording example that I just gave you, you told me that was opinion work product because of the introductory single question by the lawyer.

I must say, you seem to be taking a very extreme position; that's why I'm bothered by it.

MR. PLESEC: Your Honor, I don't think it's really that extreme. The other side is always entitled to the facts. Nobody is questioning that.

What the other side is not entitled to are the mental impressions and the opinions and the work product of the opposition. And where the interview memoranda, or the documents reflect the mental impressions, judgments, analysis of the opposition, then the adverse party is not entitled to get that work product even under a substantial need or undue hardship standard.

THE COURT: Well, I come back to my original position. I must say, I think the way I do that - I think the way I protect against that, if need be, if substantial need is shown and we have to deal with these things, is that I take a look at them and see, are they indeed so imbued with the attorney's mental impressions that not even a redaction could protect against disclosure of that, or are there some pieces that are segregable that are just the witness's own information, not being analyzed, commented on, filtered though, you know, the lawyer's impressions.

But let me hear from the Commonwealth on this, as to how you think I should approach it in terms of the logistics?

MR. WOOLF: I think it is necessary to view the statements in camera. I think that -- I hate to draw the analogy between pornography and opinion work product, but it is something one can recognize when one sees it. I think there is a difference between Mr. Smith saw this and, I believe that Mr. Smith is credible when he said he saw this.

I think it's clear. I think Mr. Plesec is confusing, when he distinguishes between your Honor's two hypotheticals, he's confusing substantial need with the definition of plain work product versus core opinion work product, to say that the statement is work product if the

witness is alive and -- core work product if the witness is alive, and plain work product if he's dead, gets to substantial need not whether it's opinion core work product versus plain factual work product. I think that's where R.J. Reynolds confuses the two.

If one reports, as it appears from our extract of the witness interviews, which is Tab 2, reports factual information, that is plain work product. The witness said this. The witness saw that. The witness did this. That is plain work product because it is something, one would argue -- I mean, I suppose one could argue it's not work product. But assuming, *arguendo*, it's work product, it's plain work product. It is simply a recitation of facts obtained from the witness.

And given the substantial factual nature of these statements as extracted from the Fact Team Memo and the -- what Mr. Motley called the Domsday Memo, RJR calls it Corporate Activity Project Memo, CAP Memo, from looking at what they say in these memos, quoting these interviews, it appears there are substantial factual information in them.

True, they may say, I believe the witness. He said this and I believe he's credible. One deletes the second sentence, which is the comment on the credibility of the witness.

I am bemused by RJR's position, because on the firsthand, they say, we didn't know -- or Jones, Day didn't know anything about RJR. They came in and they said, just tell us. We don't know anything. And then these witnesses go forth and talk the way one goes to a motor vehicle accident witness and says, what did you see?

Now they're saying, well, we had these mental impressions. We determined what to ask. Well, I have trouble reconciling the two positions between we didn't know anything, and people just spewed forth and we wrote it down, and now saying, oh, but we had these mental impressions. We guided these interviews. We know what we were doing, and they weren't just information gathering because we didn't know anything.

First they undermine -- they attack their own Fact Team Memo saying, this is unreliable. The lawyers didn't know what they were doing. They made lots of mistakes. Your Honor says to them, well, then, why not go to the source material?

Then they say, well, the source material is privileged because we had these mental

impressions. We were directing the scope and nature of the interviews. I do find it inconsistent for RJR to take these two positions.

But as Mr. Plesec notes, and your Honor, of course, knows, mental impressions, conclusions, such as, I believe the witness is credible, legal theories, this will help us support our argument that X or defense of Y, those are redactable. And those, I would suggest, are what is meant by the mental impressions, the core opinion work product.

That is substantially different from the extensive historical factual recitation that is contained in these interview memoranda, as quoted extensively in the two RJR -- well, quoted extensively in the Fact Team Memo, and to a lesser extent, in the Doomsday or CAP Memo. It's fact. And the only way to do this is to go through it and read it. And I don't see any other way.

I mean, to say it's privileged, or core work product at the get-go, and there's no way to sort everything out, I think is disingenuous, and the disingenuousness of it is belied by what we already have, which is, extensive quotations from them. So I think your Honor does have to look at them.

And as I understand from RJR, there's only 46 of them, and they run somewhere between 5 and 15 pages. In terms of scope, it's not as -- it's not even as long as the Corporate Activity Project Memo itself.

THE COURT: Anything further, Mr. Plesec, before we move on to your argument on the subject of substantial need?

MR. PLESEC: Yes, your Honor.

I think that Mr. Woolf is confusing simply a recitation of facts in a piece of paper versus a judgment rendered by lawyers as to which facts to put down on a piece of paper: which are important; which do they think are going to be needed for purposes of providing legal advice; which are important for purposes of defending litigation, these types of things.

The fact that a memorandum contains factual information contained by the interviewee does not mean that it is not intertwined with the lawyer's mental processes and judgments and opinions as to what is important and what is irrelevant and so forth.

The lawyers are doing what the Supreme Court has said they should be doing, gathering information, determining what is relevant and what is irrelevant, recording what they believe

might be relevant, rejecting that which they don't deem is worthy of recording. And so, the entire process of recording information in a memorandum is a demonstration of the exercise of judgment and the mental processes of a lawyer.

Going back to the example that the Court gave earlier about the tape recording, perhaps the words of the witness in that scenario are more akin to the witness writing a statement and signing it than the interview memorandum here. But if the actual questions put to the witness on interview are recorded on that tape recording, I still believe that that demonstrates the mental processes of the lawyer, indicating the areas of inquiry that he or she believes ought be pursued. So the questions that would be put even in a tape recording are important mental processes that are deserving of protection.

Now, maybe if you go back to your example and you say, let's redact out all the questions, and all you have is the voice of the witness recording the facts, then maybe that's more akin to the witness statement that I suggested earlier, but it's hard to suggest that even in a tape recording situation, where you have the mental processes reflected of what the lawyers thought were important to put to the witness, that those things do not rise to the level of opinion work product.

I was going to make a point about substantial need, but I believe the Court was going to ask the Court to demonstrate its -- ask the Commonwealth to demonstrate its views on that.

THE COURT: In terms of substantial need, we're, I think, operating a little bit in the dark at the moment because we don't have the definitive list and status of who these people are. Is the person dead? Is the person unavailable? Or is the person available and been deposed? When deposed, did the person claim, I have no idea what you're talking about; I don't even remember any of this stuff. Or did the person give a lot of information?

To what extent, if any, which, again, I'd have to deal with it on in-camera review, do the underlying memos contain any facts that haven't already been put forth in the CAP Memo, or the R&D Memo. I mean -- the Fact Team Memo. I do get the names confused, or the memos confused. But anyway, it seems to me there are a lot of issues on substantial need that are a little bit difficult to address short of, you know, a witness-by-witness breakdown of where things

stand.

So it's a little bit hard to ask the Commonwealth, show us your substantial need, until we have that list to work from. And obviously, particularly, if I side with RJR as to Upjohn, but with the Commonwealth as to former employees, we need to know what that list is just to tackle this piece of it.

Maybe what I should do though, is ask RJR what things would, if any, would you yourself recognize as substantial need? I assume if the witness were dead, would that satisfy you? I mean, where do you say that line should be drawn, and then when I get the chart we'll see where it is.

MR. PLESEC: The substantial need standard has to be satisfied by the person who is seeking access to the information. It's the Commonwealth's burden to demonstrate that they have the substantial need to get access to the information. That's not a position that I'm ready to articulate today because I don't know what their argument is.

They have simply said that they need the stuff without really setting forth the reasons why they believe there is a substantial need to get access to these interview memoranda, assuming that they were only work product.

THE COURT: Well, let me ask the Commonwealth, how much information do you have as of now to address the substantial need issue on a witness-by-witness basis, or even by certain identifiable categories?

MR. WOOLF: It was our understanding that your Honor was going to address the attorney-client privilege issue, and the people at Ness, Motley who are most knowledgeable in the substantial need issue were not available to come.

I can tell you, for example, that Lorraine Pollice, who was not an employee but that was one of the people who was interviewed, was asked about a log in her deposition. That is referenced in an interview memorandum.

In her deposition, as I understand it, she did not remember it. So clearly there's substantial need when a witness has a failure of memory. Or is dead. Or testifies at variance to a prior statement. Those are things that I briefed generally in the initial memorandum. But as to the specifics, your Honor, I'm not in a position to discuss that.

THE COURT: Okay. Let's do this. Let me make my decisions, which I will get to you

shortly, on attorney-client privilege, and that will define what categories, if any, need to be addressed as work product, substantial need, and then, you know, before the parties have to undertake the logistics of the kind of -- because I think it does have to be done on a witness-by-witness basis. I'm not going to across the board say, well, just because this was a long time ago, every single one of these has automatically a substantial need. I think it does have to be done on a witness-by-witness basis. So let me hold off on that.

The last item that I did want to address is Pollice, and then there was the other statement where I have seen those in camera, the two Pollice statements and the one from the other witness.

Before we even talk about joint defense, let me say from my -- simply from my own review, the other witness which in your redacted versions you describe as a consultant retained for litigation, from having seen it, it clearly does appear to me to be a consultant retained for litigation, not in fact even a fact witness, but an expert consultant clearly being questioned about matters concerning an upcoming trial. I am satisfied that that is opinion work product. It's not something that would need to be produced in any event. So that one does not need to be addressed further.

So that would leave only the two memos pertaining to Miss Pollice as someone who was never an RJR employee, and yet, was interviewed, is that correct?

MR. PLESEC: That's correct.

THE COURT: So we've narrowed it down. So she's the only one.

Let me hear you -- I know you've addressed these issues before, but now that I've narrowed it down to specifically her and joint defense, is there anything further you want to say about why her interview is protected as joint defense?

MR. PLESEC: Yes, your Honor. Just to recap what we have already submitted, at the time that Marilyn Forbes was at CTR doing her work, CTR and Reynolds, as well as other tobacco companies, were codefendants in a number of pieces of litigation around the country, and I think the affidavit of Mr. Ronald Bianchi will demonstrate the number of cases involved at that period of time.

When Miss Forbes was doing her work at CTR, she identified a couple of issues that she thought should be addressed with respect to

defending Reynolds and CTR in that litigation.

She identified the issues as the memoranda demonstrate. She talked to Miss Pollice, who had information about those issues. She gathered that information for purposes of analyzing the facts pertinent to the issues. She made some judgments about certain of the problems that she had identified and the issues.

The fact that Miss Pollice was not an employee of Reynolds at the time is of no moment in the context of a joint defense, common interest situation. And in this particular situation, Miss Pollice was working for CTR, who was not only a codefendant with Reynolds in much of the litigation, but indeed, Reynolds was a founding member of the Tobacco Industry Research Committee, which later became the CTR. And so, there was an additional layer of relationship here.

Beyond that, I think the case law is clear that when parties are in a joint defense or common interest situation, the attorney for, in this case, CTR, does not have to be present while the attorney for one of the other defendants or parties with a common interest is gathering information for purposes of litigation or matters of common interest.

As Miss Forbes' affidavit clearly points out, she believed that she was collecting information that is covered by the attorney-client privilege as well as by opinion work product. And so, we would strongly urge that the Court find that each of the memoranda that have been submitted in camera are not only opinion work product, but are indeed attorney-client privilege material also.

THE COURT: Let me ask you this, without revealing what the item is, I must say, looking at the statement, there is one point where Miss Pollice declines to answer something that Miss Forbes asks her, saying that she wants to go over it with CTR's own lawyers first. I mean, a curious situation that in the view of the witness herself, she was not going to confide everything in Miss Forbes. It's a curious wrinkle, it seems to me, in joint defense, her own recognition that in her own mind there was something different between CTR's own lawyers and the lawyers who you say were part of this joint defense.

What, if anything, do you make of that? Again, I'm not asking and I'm not intending to divulge what the point was.

MR. PLESEC: Well, your Honor, I think what we really see is a woman who is not tutored in the legal profession; not knowing the ins and

outs of the legal process. CTR at the time was changing counsel. Old counsel was leaving; Debevoise and Plimpton was just coming on board, and I think it was an exercise in caution on her part that she wanted to talk to the CTR lawyers before she continued on on that issue.

THE COURT: All right. Again, the Commonwealth has talked to me some about joint defense, but is there anything more you want to add today as that is germane now to this one witness?

MR. WOOLF: Again, your Honor, I'll have to beg the Court's permission to supplement this for two reasons. First of all, because I think that the issue of substantial need is a factually -- in part, factually driven, and I'm just not familiar enough with Miss Pollice.

But I do want to raise one point. Your Honor may recall that when we had the hearing on the case management order and the defendants wanted some broad language on joint defense, and the more they argued the more your Honor became curious as to what was motivating a joint defense claim. And the fact is, there was no joint defense agreement, or anything, you know, up until a couple of years ago. Certainly not ten or fifteen years ago when Miss Pollice was interviewed.

And, so, it begs the legal question, given that there was no recognition in Massachusetts, then or now, of joint defense. And I certainly don't know what the law was in that state at the time about joint defense, whether it was even recognized because it's a relatively new concept in litigation, whether one can, after the fact, assert a joint defense privilege when the concept wasn't in existence at the time.

But I think that that was something that we would request an opportunity to explore briefly with the Court.

THE COURT: Let me recommend this. One of the things that you raise, Mr. Plesec, with regard to the Pollice -- the two Pollice statements, was indeed the assertion that essentially everything in them was already in the, you know, the comprehensive memo itself, that it had been picked up verbatim. And it may be just the logistics. You indicate somewhere that you had put in the attachments, that you had highlighted those parts from the Forbes' Memo that had been, you know, verbatim.

MR. PLESEC: Yes.

THE COURT: It may just be logistics. I can't seem to find the version that has that

highlighting that makes that easier for me. In other words, if I agree with you on that, that it's all there anyway, then clearly there's no substantial need. They've already got it, and I don't need to worry about joint defense and whether it applied to Miss Pollice back in the mid-eighties.

MR. PLESEC: Your Honor, we'll submit another copy.

THE COURT: There seemed to be a version -- there was a version under seal sent to the clerk, and a version under seal sent to me, and it may have been that just one of them has that highlighting and not the one that got to me.

I don't want extra versions of things that are under seal floating around any more than necessary, but are you sure that you highlighted one of them?

MR. PLESEC: Mr. Wood advises me that only one was filed under seal, and it was highlighted.

THE COURT: And made it to me. And you think -- I didn't see it highlighted.

MR. WOOD: That's correct. It went to you only, your Honor.

THE COURT: It went to me only. Then I do need --

MR. PLESEC: Your Honor, let us undertake to give you a new copy.

THE COURT: I don't need all the attachments, just the guts of it with the highlighting that lets me take a look at that issue.

If I agree with you on that issue, then I don't even need to address any of these other points.

MR. ZIRLIN: Your Honor, excuse me. On the matter of the two Pollice memos, there is one other slight wrinkle. I know we're piling wrinkles on top of wrinkles.

Within the Pollice -- within the two Marilyn Forbes' memos themselves, putting aside the conversations with Miss Pollice, there are items in those two memos that are clearly attorney-client privilege in that they reflect the advice that CTR's counsel gave to CTR. And should -- I have copies of each memo that we've marked the redactions on, that if for some reason it turns out that they do have a substantial need and you rule that they are entitled to it, we'd like you to see these now with the redactions.

I mean, you don't have to look at them right now.

THE COURT: So CTR's own proposed

redactions?

MR. ZIRLIN: Exactly. And we're doing this now so that if it turns out, you know, a few weeks from now, somebody will say, why didn't you say something.

[Documents handed to Court.]

THE COURT: I'll take them now.

In terms of where we go from here, what I will need to do is at least communicate to you, hopefully as soon as I can, after I get your tables of the state law, at least a bottom line of what my ruling is going to be on Upjohn and former employees and things so we know what additional work does or doesn't need to be done. And in the interest of time, I may indeed communicate that to you in a very -- my bottom-line fashion without necessarily a full memo explaining my reasons at the same time.

When can I expect to see these lists of citations of states that have followed Upjohn, not followed Upjohn, what kind of time frame do people need to update that for me?

MR. PLESEC: I believe we should be able to get the Court a list of the states that are following Upjohn in about a week.

MR. WOOLF: Yeah, next Friday.

THE COURT: Okay. And as soon as I get those, I'll take a look at it, and as I say, at least communicate the bottom line of my decision. If I decide that some or all of these people -- the interviews with these people is not protected by attorney-client, we then obviously do need to move on to the nitty-gritty of substantial need with regard to those people.

It's hard to map that out now, too, because you don't know how many people that might or might not involve. It might involve none. It might involve all. It might involve half.

MR. WOOLF: I assume Mr. Plesec will deliver on Friday, also, the list of current versus former employees.

THE COURT: Yes, the current versus former employees' list so we can get that. All right.

Yes?

MR. PLESEC: May I, with the Court's indulgence, move it from a week from today to the following Monday, ten days from now, on our submissions? I'm going to be on vacation next week.

THE COURT: You are entitled to a vacation for sure. If that's what you need, that's fine.

MR. PLESEC: Thank you.

THE COURT: I'll wait until I have both

of those, but as I say, expect at least a short ruling shortly after that. And then perhaps by at least the time of the next status conference, we'll know where we stand on, and map out, getting any substantial need questions addressed.

All right, anything else that we can do today, or that need to be addressed today before we simply schedule our next session?

Our next session, when, and any previews of agenda items just so I know how much time to schedule? Any sense?

MR. GRIFFIN: I can speak to when. I don't think I have any particular views about a preview that I can predict, your Honor, but in terms of talking with defense counsel, subject of course to your own availability, and you're entitled to a vacation, should that be on the horizon, the thought was that Thursday, August 27th would be a convenient date; less convenient for some will be Thursday, August 20th. That's only from the defense side. I don't have a sense of the availability of counsel for the Commonwealth.

MR. WOOLF: If I could just have a moment, your Honor?

[Conference between counsel.]

MR. WOOLF: Either one, your Honor.

MR. WEBER: I prefer the 20th, your Honor, because we believe there should be an earlier report date on the issues related to the trial exhibits, experts, depositions, things like that. We think we ought to keep the parties moving, so we prefer the 20th.

THE COURT: Either is fine with me.

MR. WEBER: Or, alternatively, your Honor, if we could ask the Court for an earlier report date on the -- particularly the issue of the trial exhibits. And we don't -- we wouldn't mind a status conference on the 27th, but we'd like to get that particular issue moving and before the Court and not wait until the 20th or the 27th.

MR. GRIFFIN: May I suggest we fashion some sort of a status report on those two issues that we can do on the 20th, and then we can discuss with the Court anything about those, or other agenda items, between the 20th and the 27th.

MR. WEBER: Your Honor, I think that's way way too long. We'd like to actually start beginning exchanging trial exhibits before the 20th of August. We've proposed that to the defendants, and if they don't agree to that, we'd like to get before the Court and get that moving.

MR. GRIFFIN: Your Honor, may I suggest, instead of struggling with this now, we're going to meet next week, or as soon as possible, to continue the business both about the exhibits and also to discuss expert witness discovery matters. Let's get those meetings under our belt, and report to your Honor then about the status of them and determine whether we need to see you sooner or later, and then we'll just adjust as we need to, depending on what we need to, and when you are available to see us, if you need to see us.

THE COURT: I'm available to see you either, or if need be, both days. My vacation will be long over by then, so I'm set.

I don't want to have status conferences prematurely when people say they are not ready to discuss things. By the same token, time is becoming very much of the essence, and I do not want to unnecessarily put off a status conference that could accomplish something productive and keep us on track.

MR. WEBER: Your Honor, may I suggest that perhaps we can resolve these issues next week and then we can get back to you as to whether we're continuing to maintain that the 20th is necessary.

THE COURT: Let's do that. I'm available, as I say, on either or both days. So communicate to me enough in advance and we'll set it, and see you.

I repeat, I particularly, here where people are not giving me much -- there's not a preview of an agenda, I really need the agenda enough in advance to have my own thoughts together to make productive use, whether it's the 20th or 27th, so I do need the agenda enough in advance.

Whether it's either the 20th or the 27th, one thing I do owe you, and I very much apologize for the delay, is my actual decision on the waiver argument about the thirty-nine thousand, thirty-seven thousand. I thought I would have that completely done long before now. I am just now finishing it. That will be to you shortly, and it will certainly be to you in advance of that so everybody knows.

MR. GRIFFIN: Your Honor, in terms of housekeeping, I was going to send a letter on behalf of the defendants, sometime probably next week, just reminding your Honor of our request about the entry of orders on the Motions to Dismiss, and the motion regarding Medicaid recipient discovery, which I don't believe have

issued as yet. And I think they were --

THE COURT: I thought I had taken care of that. You had raise that before.

MR. GRIFFIN: We submitted a proposed form. Mr. Parsigian did it back the end of May. As far as I know, your Honor, those have not been entered. I'll be happy --

THE COURT: And nothing got entered on the docket itself either, you say?

MR. GRIFFIN: Not that I have seen.

THE COURT: All right. Anything else?

Okay. Then I'll await to hear from you.

[Court adjourns 12:09 p.m.]

CERTIFICATE

I, Patricia Bellusci, do hereby certify that the foregoing transcript, pages 3 through 101, is a complete, accurate and true record of my voice recorded tapes taken in the aforementioned matter to the best of my skill and ability.

Patricia Bellusci
Official Court Reporter

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